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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 375

DORSEY K. OFFUTT, An Attorney, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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Petitioner, Dorsey K. Offutt, an attorney at law, respectfully prays that a writ of certiorari issue to review a decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered June 17, 1957, modifying a contempt judgment entered by Visiting Judge R. N. Wilkin of the United States District Court for the District of Columbia and reducing petitioner's sentence from forty-eight to six hours.

THE OPINIONS BELOW

The United States District Court adjudged petitioner guilty on two charges of contempt on October 11, 1956. The Memorandum Opinion of the District Court is printed in the Appendix hereto at p. 1a, et seq. and at R. 11-22.[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the Charge III and affirming Charge I has not been reported. It appears in the Appendix at p. 14a, et seq. and at R. 565-566.

JURISDICTION

The decision and judgment of the Court of Appeals was entered on June 17, 1957 (R. 565). The Court of Appeals has stayed the issuance of its opinion and the certified copy of its judgment and this Honorable Court has extended the time for the filing of this Petition for Certiorari to and including August 16, 1957. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A., Sections 1254 and 2101, and Rule 37 of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

The Court of Appeals modified a judgment of contempt of the District Court and reduced petitioner's sentence from forty-eight to six hours, principally because the court below reversed the judgment of guilt on Charge III because the evidence did not support that charge (R. 566, App. p. 15a). The Court of Appeals affirmed Charge I, notwithstanding that the only evidence submitted in support of the prosecution's case in chief was the entire transcript of record in a criminal

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[1] R. refers to the transcript of record of the court below filed with the Clerk of this Court.

proceeding entitled *United States* v. *Henry L. Peckham, Jr.*, Criminal No. 579-52, to which petitioner was not a party, in which he acted as defendant's counsel and out of which proceeding the alleged contempt arose. When the prosecution below rested its case on the transcript of this prior criminal trial, over petitioner's objections, petitioner moved for a finding in his favor because there was no evidence upon which to properly base a finding of contempt which motion was erroneously denied. The Court of Appeals affirmed the conviction based solely upon a transcript of a prior trial stating the validity of the conviction is not impaired by error (R. 566, App. p. 15a) notwithstanding this Court's decision in *Nilva* v. *United States*, 352 U.S. 385, 25 L.W. 4155.

The *Nilva* case, which holds that a contempt conviction of a lawyer cannot rest on the incompetent and hearsay transcript of the criminal trial out of which the contempt arose, was urged upon the court below as controlling here but that court utterly disregarded and ignored it. (R. 556-561, 565-566). Against this background the following questions are presented:

1. Whether a conviction for contempt in a Rule 42 (b) proceeding can rest alone upon the hearsay transcript of a prior trial, in which petitioner is not a party, and out of which the alleged contempt arose.

2. Whether the courts below refused to follow the instructions of this Honorable Court in this case when this Court remanded it to the District Court for a rehearing in *Offutt* v. *United States*, 348 U.S. 11, reversing *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F. 2d 842.

3. Whether under the circumstances of the case petitioner was denied due process of law because the trial judge based his finding and judgment of guilt upon the personal knowledge he obtained from the hearsay transcript of the Peckham case, particularly when the trial judge held the announced and erroneous view that no matter what judicial impropriety was involved and no matter what evidence was submitted by petitioner in defense of his conduct, that such judicial impropriety and such defense testimony could never be considered as a defense to a charge of criminal contempt and could only be considered as extenuating circumstances (R. 18, App. pp. 6a, 9a). Involved in this question is the important and subsidiary question of whether under such circumstances a jury trial should not have been afforded petitioner, in order that he be afforded not only a fair and impartial trial but also in order to preserve that appearance of fairness which due process of law requires.

4. Whether the charges as made complied with the provisions of Rule 42(b) because not made by the presiding judge in the Peckham trial, and whether the charges should not have been dismissed because the tactics of the prosecution delayed any hearing on the last remaining charge for a period of some four years and three months, thereby prejudicing petitioner and depriving him of the speedy trial guaranteed him by the Sixth Amendment to the Constitution.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

"No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * nor be charged more than once with the same offense."

The Sixth Amendment to the Constitution provides in part as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 18, Section 401, U.S.C.A., provides:
"Power of Court:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

FEDERAL RULES OF CRIMINAL, PROCEDURE, Title 18, U.S.C.A., Rule 42. Criminal Contempt.

(a) "Summary Disposition.—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed

in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) "Disposition Upon Notice and Hearing.—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States Attorney, or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilty, the court shall enter an order fixing the punishment."

STATEMENT OF THE CASE

As the opinion below points out (R. 565, App. p. 14a), the petitioner has been before that court three times on the charge now before this Honorable Court. In June 16, 1952, he was summarily adjudged guilty of twelve charges of criminal contempt by Judge Alexander Holtzoff while acting as defense counsel in a criminal case entitled *United States of America* v. *Henry L. Peckham, Jr.*, Criminal No. 579-52. On appeal to the court below only four of the twelve charges against petitioner were affirmed and that court reduced Judge Holtzoff's ten-day sentence to forty-eight hours,

principally because of the judge's misconduct. *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F. 2d 842. This Honorable Court granted certiorari and in *Offutt* v. *United States*, 348 U.S. 11, reversed *Offutt* v. *United States*, supra. In reversing this Honorable Court ordered, in the enforcement of Rule 42(a), that it was the duty of courts to safeguard two indispensable conditions to the fair administration of criminal justice, the first being that "counsel must be protected in the right of an accused to 'fearless, vigorous and effective' advocacy no matter how unpopular the cause in which it is employed," citing *Sacher* v. *United States*, 343 U.S. 1, 13-14. Because of the personal involvement of Judge Holtzoff with petitioner and because of the judge's hostility, bias, and lack of impartiality, this Court reversed the first Offutt decision below and concluded that the rule pronounced in *Cooke* v. *United States*, 267 U.S. 517, should be followed and remanded the case with instructions that if petitioner were to be tried, again another judge should preside over the second hearing, 348 U.S. 17-18.

On March 11, 1955 in an original proceeding in the District Court the United States Attorney filed before a judge other than the presiding judge in the *Peckham* case, District Judge Charles F. McLaughlin, an application for an order to issue to petitioner to show cause why he should not be adjudged in criminal contempt. This application referred to the criminal case of *United States of America* v. *Henry L. Peckham, Jr.*, Criminal No. 579-52, and stated petitioner was the attorney for the defendant in that case. No order to show cause based on this application was issued by Judge Holtzoff, who presided at the Peckham trial, but Judge McLaughlin issued the requested

order to show cause. The application and order concluded that the alleged misbehavior of petitioner constituted a criminal contempt in violation of 18 U.S.C.A., Section 401. The order to show cause of Judge McLaughlin directed petitioner to show cause why he should not be adjudged in criminal contempt on the following charges:

I. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

II. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness.

III. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "*When* were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case.

IV. He constantly tried to create an episode that might lead the court to direct a mistrial.

Motions of petitioner to dismiss the charges were denied. Petitioner filed a sworn return denying the charges. On May 9, 1955, Judge McLaughlin, contrary to the mandate of this Honorable Court in *Offutt v. United States,* 348 U.S. 11, conducted a summary hearing of the charges over petitioner's objections, re-

ceived the hearsay and incompetent transcript of the Peckham trial in evidence against petitioner, refused to permit petitioner to testify in his own defense, or to produce witnesses or other evidence in defense, explanation or in mitigation of the charges. On May 11, 1955, Judge McLaughlin acquitted petitioner on Charges II and IV of the order to show cause and found him guilty on Charges I and III of that order.

Petitioner appealed a second time to the court below and that court reversed Judge McLaughlin and remanded the case for a hearing in accordance with the rule announced in *Cooke* v. *United States*, supra, as required by the mandate of this Honorable Court in *Offutt* v. *United States*, 348 U.S. 11.

On remand to the District Court petitioner renewed his motions to dismiss the charges as barred because the delay of over four years caused by the tactics of the prosecution deprived him of a fair and speedy trial and demanded a jury trial in the alternative. On September 24, 1956, Judge Wilkin of the District Court, after overruling petitioner's motions, ordered the case to proceed in accordance with the mandates and opinions of this Honorable Court and of the Court of Appeals below (R. 66). Without any opening statement the prosecution had the clerk produce the transcript of testimony in the case of *United States of America* v. *Henry L. Peckham, Jr.*, Criminal No. 579-52, some 2,000 pages long, and offered it in evidence in its entirety. Petitioner objected to the transcript, to this summary method of trying the case and urged that if the court was going to receive this transcript or any part of it in evidence against petitioner, over his objections, the prosecution should be required to read from the transcript those specific portions upon which

the prosecution relied. (R. 66-68) Over petitioner's objections the entire transcript was received in evidence by Judge Wilkin. (R. 68). The prosecution then read parts of this transcript in support of Charges I and III of the order to show cause (R. 68-140), and rested (R. 140-142). Petitioner moved for a finding of not guilty on Charges I and III because the receipt in evidence of the Peckham transcript and the reading of parts of it could not be used as a basis to establish petitioner's guilt beyond a reasonable doubt on the Charges I and III. Petitioner contended that the prosecution "failed to make out a case, among other things, because guilt could not be based on the Peckham transcript alone," first because "it was no proof" at all and to establish petitioner's guilt the case in chief had to be supported by live testimony establishing beyond a reasonable doubt the guilt of the accused on both charges (R. 63-68, 142-146). Petitioner contended on this posture of the case, i.e., a case based entirely on the transcript of another case improperly received in evidence and without other supporting testimony, that the trial court properly could "do nothing but enter a judgment in favor of Mr. Offutt." (R. 142) The trial court erroneously "overruled" petitioner's proper motion. (R. 144).[2] Judge Wilkin ordered petitioner to proceed with his evidence. At the time the prosecution rested, all fourteen jurors, in-

[2] The prosecution later submitted findings of fact, the trial judge adopted these findings of fact, and they are based solely upon the transcript of the record in the Peckham case (R. 22-27). These findings do not refer to any testimony or other evidence presented to the trial judge. They make no reliance upon certain "rebuttal" testimony which actually was testimony in chief and which was erroneously received in evidence by the trial judge over petitioner's objections (R. 22-27).

cluding the two alternate jurors, who sat in the Peckham trial, were in the witness room and under their subpoenas were not to depart without leave of court (R. 534-535, R. 8-9). None of these jurors, nor the presiding judge in the Peckham trial (Judge Holtzoff), nor the prosecuting attorney of the Peckham case, who were in the courthouse when the case below was tried, were called as witnesses in the prosecution's case in chief (R. 534-535). Petitioner's counsel thereupon made an opening statement (R. 158-159) and then proceeded as follows: Ten respected members of the bar, who attended the Peckham trial and who were familiar with the instances of alleged discourtesies relied upon by the prosecution in support of Charge III, namely, Earl H. Davis (R. 160); Abraham Chaifetz (R. 178); James F. Bird (R. 193); Jean M. Boardman (R. 199); Irving A. Levine (R. 216); David Fillmore Smith (R. 224); John J. Spriggs, Jr. (R. 267); Jacob Stein (R. 285); Colonel O. R. McGuire (R. 293); and Charlotte Maskey (R. 374), were called and testified in petitioner's defense. In addition petitioner testified fully in his own defense (R. 375). Another attorney, George Hayes, Chairman of the Public Utilities Commission, in view of Judge Wilkin's admonition that further testimony in defense would be cumulative (R. 373) was not called but was proffered in corroboration of the testimony of Colonel O. R. McGuire (R. 375). Two prominent criminal lawyers Myron C. Ehrlich and T. Emmett McKenzie appeared in court to testify in petitioner's defense concerning the advice and counsel they had given him to the effect that he should make objections and motions dealing with the misconduct of the trial judge and describe therein the prejudicial mannerisms, tones and inflections of his voice at the

times the prejudicial actions occurred, and that it was petitioner's duty to his client to make these motions and objections. (R. 443-444). They also advised petitioner if the trial judge would not permit him to come to the bench petitioner should make his objections and motions in open court. A stipulation was entered into by the prosecution that these attorneys were "fine attorneys" and would testify in the foregoing manner in petitioner's defense (R. 443-444). The defense showed that William E. Leahy and three other respected members of the bar who would have been important witnesses in petitioner's defense had died during the four years delay in the affording of a hearing to petitioner and because petitioner was thus deprived of their important testimony, he was prejudiced (R. 411). Several of the attorneys who testified in petitioner's defense attended all or substantially all of the Peckham trial, namely Mr. Stein, Mr. Smith, and Miss Maskey. Others had witnessed many of the instances relied upon by the prosecution in support of Charge I, namely, Mr. Davis, Chaifetz, Mr. Boardman and Mr. Levine. The undisputed testimony of these respected members of the bar was all one way and to the effect that petitioner at no time was insolent, insulting, or offensive to Judge Holtzoff, and at no time was he guilty of any discourtesy to that judge. All witnesses agreed petitioner's language, manner, mannerisms, tone of voice, and his movements were proper, courteous and could not be construed as insolent, insulting, offensive or discourteous. The witnesses who witnessed the factual situations involved in the objections and motions of petitioner testified that these factual situations were true and the facts were correctly stated in petitioner's objections and motions. Thus the undisputed testi-

mony of these thirteen lawyers established, where objections were made to the tone of Judge Holtzoff's voice, his prejudicial movements, his prejudicial mannerisms, to his signalling the prosecutor and to his yelling on many occasions, that the described judicial misconduct occurred and petitioner's objections and motions thereto were based upon true facts. All defense witnesses agreed that the descriptions in the objections and motions concerning Judge Holtzoff's misconduct, the misconduct of the prosecutor and the misconduct of the prosecutrix were factually correct and justified petitioner's objections and motions concerning this misconduct. Petitioner testified at length (R. 375, et seq.). His undisputed testimony was clear, direct, precise, and established that every objection and motion he made dealing with the misconduct of Judge Holtzoff, the prosecutor, and the prosecutrix were predicated upon true facts and these facts occurred as detailed in petitioner's objections and motions. Petitioner testified that every action which he took in the Peckham trial, every objection he made, every motion he made and every question he asked were made and asked in good faith and at no time did he in anyway intend to be insolent, offensive or discourteous. Petitioner testified his tones of voice were normal, proper, not discourteous and he used no improper langauge against Judge Holtzoff.

Insofar as Charge III is concerned we need only state that the undisputed evidence showed that the petitioner had foundations in fact for every question involved in this charge. The trial judge in his memorandum opinion found petitioner had a foundation in fact for every question he asked but nevertheless found petitioner guilty of this charge on the novel theory that

there was no foundation in law for asking them even though the trial judge cited authorities supporting the right of petitioner to ask these questions (R. 18-19, App. p. 10a). On this state of the record the court of appeals below properly reversed Charge III as not supported by the evidence. (R. 566, App. p. 15a). While the prosecution called two jurors in rebuttal, their testimony was objected to as not rebuttal testimony but testimony in chief and while the trial judge took this testimony under consideration, he did so subject to petitioner's objections thereto and later ignored it entirely in his findings of fact and conclusions of law (Footnote 2 supra, R. 22-27). While an examination of the testimony of these jurors adduced on cross examination supports petitioner's innocence (R. 508-513, 517-522), it will not be discussed because this testimony was not relied upon by the trial court in its findings of fact and conclusions of law (R. 22-27). Judge Wilkin filed a memorandum opinion (R. 11, App. p. 1a) which imposes on trial counsel and particularly on petitioner impossible standards of conduct. Judge Wilkin ruled that no matter what improper conduct comes from a trial judge, such conduct will never justify such conduct as petitioner engaged in and is not a defense to a charge of criminal contempt. (R. 18, App. p. 9a) Judge Wilkin also ruled that a trial counsel can never address a trial judge without obtaining leave first to address him and even though criticisms and accusations against the judge's conduct are factually correct, trial counsel "should be silent" and should trust "that his silence will plead his cause." Judge Wilkin even ruled that petitioner's conduct should be measured by the conduct of Socrates who accepted death with "magnificent equanimity" even when the death "sentence is unjust." (R. 16-18, App. p. 8a) Judge Wilkin held petitioner

should have stood "mute" and should not have made the motions and objections that he did because "Jesus of Nazareth stood mute before Pilate" and petitioner should have kept silent because "Jesus kept silent." (R. 17-18) Other examples of meekness and martyrdom are stated by the judge as standards to be applied in determining petitioner's guilt (R. 17-18). (App. pp. 7a-9a) The Martyrdom of Socrates, the Godlike conduct of Jesus at his crucifixion and the other examples of meekness and martyrdom applied by the trial judge lead him to conclude that trial counsel in effect should "genuflect" before a trial judge, should be humble because humility forestalls humiliation, and if a trial attorney objects and makes motions concerning the judge's and the prosecutors' misconduct such objections and motions are "back-talk" and hence contemptuous (R. 17-21, App. pp. 7a-12a).

Accordingly, Judge Wilkin erroneously found petitioner guilty of Charges I and III. Petitioner appealed from the judgment of conviction and the court below has reversed Charge III because not supported by the evidence. Petitioner seeks certiorari to correct the improper and unfair administration of justice in this criminal contempt case because inherent in the decisions and judgments below concerning Charge I are dangerous precedents inimical to the public interests.

REASONS FOR GRANTING THE WRIT

This case presents for correction errors of the United States District Court for the District of Columbia not corrected by the Court of Appeals for the District of Columbia Circuit. The case is one of importance and deals with the right of a defense counsel in criminal cases under contempt powers not to be deprived of his right of advocacy, his liberty and his right to practice

law contrary to the provisions of the Fifth and Sixth Amendments, and Rule 42(b) of the Federal Rules of Criminal Procedure.

The courts below have rendered decisions in conflict with the applicable decisions of this Court and other applicable decisions. The court below has permitted and sanctioned such a departure from the accepted and usual course of criminal proceedings relating to contempt cases as to call for the exercise of this Court's powers of supervision and correction. The decisions below have failed to apply the fundamental premise of our criminal law that the prosecution has the burden of proving by competent evidence that the accused in a contempt case committed the offense charged. They deny petitioner his Constitutional right to be confronted by his accusers, his right to cross-examine his accusers (whose hearsay testimony was used against him), fail to enforce the guarantee of a speedy trial and fail to afford petitioner a full, fair and impartial trial.

I

The Court Below Also Should Have Reversed Charge I of the Order to Show Cause of the District Court Because a Conviction for Criminal Contempt in a Rule 42(b) Proceeding Cannot Rest Alone Upon the Hearsay Transcript of Another Trial in Which the Accused Was Not a Party and Out of Which the Alleged Contempt Arose

The single charge of criminal contempt remaining against petitioner charges him with being discourteous to the court, i.e., to Judge Holtzoff during petitioner's defense of the Peckham trial. Petitioner has been subjected to three summary hearings by the district court below on this charge. He has been required to appeal these erroneous procedures and to procure their re-

versal and this in the face of this Court's decision in *Offutt* v. *United States*, 348 U.S. 17-18, directing a hearing of this charge against Mr. Offutt, in accordance with the principles announced in *Cooke* v. *United States*, 267 U.S. 517. It has taken petitioner over four years to get even a semblance of a hearing in the District Court on this charge, notwithstanding that this Court in the *Cooke* case stated that in a contempt hearing before another judge for alleged contempt against a judge, that the accused should be permitted to produce evidence in defense as well as in exclupation in such a hearing.

On the third abortive hearing insofar as the prosecution's case is concerned, Judge Wilkin again proceeded summarily, without requiring the prosecution to make an opening statement and without requiring the prosecution to prove by competent evidence Charge I against petitioner. Judge Wilkin received the entire transcript of the Peckham trial in evidence and when the prosecution rested relying upon that hearsay transcript alone, Judge Wilkin erroneously "overruled" petitioner's motion for a finding of not guilty. (R. 66-68, 142-146) Judge Wilkin, in the very face of the undisputed testimony of thirteen lawyers and petitioner, which established beyond dispute the innocence of the accused, based guilt solely upon the incompetent and hearsay transcript of the *Peckham* case, received in evidence over petitioner's objections. The Peckham transcript involved a criminal case in which petitioner appeared as defense counsel. He was not a party to that litigation. The alleged contemptuous conduct involved in Charge I occurred in that case. The proceeding to adjudge petitioner in contempt was instituted by a judge other than the presiding judge of the Peck-

ham trial and was heard before a second judge who has no personal knowledge of what occurred at the Peckham trial. In such circumstances it is not proper to receive in evidence against petitioner the transcript of the Peckham trial because that puts in evidence hearsay testimony of the various witnesses who testified at the Peckham trial,[a] the hearsay statements of the presiding judge and the hearsay statements of the prosecutor. This method of proof necessarily deprives petitioner of the right to be confronted by his accusers and of the right to examine his accusers and any other witnesses whose testimony appears in the Peckham transcript and which testimony is offered against petitioner. This summary procedure fails to recognize that a Rule 42(b) proceeding before a judge other than the presiding judge in a criminal case is a separate and distinct criminal proceeding and should be treated the same as any other criminal prosecution in which the prosecution has the burden of showing beyond a reasonable doubt that the accused is guilty. This method of porceeding fails to recognize that a criminal contempt case under Rule 42(b) is a proceeding wholly separate from any prior trial out of which the alleged contempt arose. *Nilva* v. *United States*, 352 U.S. 385, 25 L.W. 4155; *Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 444-446, 451; *Hayes* v. *Fisher*, 102 U.S. 121; *New Orleans* v. *The Steamship Co.*, 20 Wall. 387; *Ex Parte Kearney*, 7 Wheat. 38.

In the recent case of *Nilva* v. *United States*, decided February 25, 1957, 352 U.S. 385, 25 L.W. 4155 the Solicitor General of the United States confessed that it was error in a contempt proceeding *even before the*

[a] These numerous witnesses whose hearsay testimony was used below are listed in the index to the transcript at pp. i-ii.

same district judge, to receive in evidence the transcript or any part thereof of the case wherein the contempt arose. All Justices of this Honorable Court in the *Nilva* case treated as a nullity the contempt conviction of Nilva based upon such an incompetent transcript. Footnote 6 of the majority opinion in the *Nilva* case states (352 U.S. 392):

> "The Government concedes that the transcript of Agent Peterson's testimony at the conspiracy trial should not have been admitted in evidence in the contempt proceeding and does not rely upon it here."

Nilva, an attorney, was cited to appear before the presiding judge in a conspiracy trial on three specifications of contempt. Specifications 1 and 2 rested in part upon portions of the transcript of the conspiracy trial out of which the contempt specifications arose. The third specification against Nilva rested upon other testimony and evidence. Nilva was convicted by the judge who presided over the conspiracy trial on all three contempt specifications. His conviction was affirmed on appeal. In this Honorable Court the Solicitor General confessed it was error to rely upon the transcript of the conspiracy trial because it was not admissible in evidence in the contempt proceedings. Whereupon this Honorable Court treated specifications 1 and 2 as void and held that Nilva had to be resentenced on specification 3 only, stating (352 U.S. 396):

> "We believe, however, that the court should be given an opportunity to reconsider petitioner's sentence in view of the fact that his conviction now rests solely upon the third specification."

The Chief Justice and Justices Black, Douglas and Brennan concurred in the vacating as void of specifications 1 and 2, stating (352 U.S. 398):

> "The Government confesses that the conviction on the first two specifications of contempt cannot be sustained. As it concedes, there was not only insufficient evidence to support the charges made in these specifications but the court admitted and relied on evidence (portions of the transcript of the testimony of the conspiracy trial) which was clearly incompetent."

The Chief Justice and the four concurring justices said of contempt cases (352 U.S. 399):

> "A fundamantal premise of our criminal law is that the prosecution has the burden of proving beyond a reasonable doubt that the accused committed the offense charged. This Court has repeatedly emphasized that a prosecution for criminal contempt should be treated the same as any other criminal prosecution in this respect (citing cases)."

In discussing the error of the trial judge who erroneously found Nilva guilty of contempt on portions of the transcript of the conspiracy trial out of which the contempt charges arose, the Chief Justice and the concurring Justices in the Nilva case held (352 U.S. 401-402):

> "The judge's position was manifestly wrong. A trial for criminal contempt is a proceeding wholly separate from any prior trial out of which the alleged contempt arose. (Citing *Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 444-446; *Hayes* v. *Fischer*, 102 U.S. 121; *New Orleans* v. *The Steamship Co.*, 20 Wall. 387; *Ex parte Kearney*, 7 Wheat. 38). A conviction for contempt in a Rule 42(b) proceeding must stand on the evidence

> properly introduced in that proceeding. Where a trial judge bases his decision in part on evidence which although material is inadmissible (here Your Honors are referring to the transcript erroneously received in evidence) the conviction cannot stand * * *."

Since the Peckham transcript was inadmissible against petitioner, Judge Wilkin's requirement, when the Government rested on that transcript, that petitioner proceed to prove his innocence was inconsistent with the presumption of innocence existing in petitioner's favor. In commenting on a similar problem in the *Nilva* case, the Chief Justice and the Justices concurring in the vacating of specifications 1 and 2 against Nilva (25 L.W. 4161) said:

> "This is completely inconsistent with the presumption of innocence which exists in favor of a person charged with criminal contempt."

To permit petitioner's conviction to stand, when that conviction is based solely upon the incompetent and hearsay transcript of the Peckham case, would sanction a departure from the due process procedures clearly enunciated by this Honorable Court in the *Nilva* case.

II

The Courts Below Have Refused to Follow the Instructions of This Honorable Court in Offutt v. United States, 348 U. S. 11

This Honorable Court in reversing *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F. 2d 842, in *Offutt* v. *United States*, 348 U.S. 11, 17-18, remanded with instructions that if Mr. Offutt were to be tried again he should be tried by a judge other than Judge Holtzoff, and in any second hearing the principles of *Cooke* v.

United States, 267 U.S. 517, should be applied. The *Cooke* case directs, when contempt cases are returned for a hearing before another judge, that the accused shall have the right to cross-examine witnesses against him and to introduce evidence adduced from the accused and from other witnesses by way of defense, in exculpation or in mitigation of the punishment. In both the *Offutt* and *Cooke* cases this Honorable Court held that a "hearing" must take place before a neutral judge on appropriate charges with an opportunity to the accused to present evidence. We submit this means a plenary hearing with the rights of confrontation and cross-examination, *Nilva* v. *United States*, 352 U.S. 385, 25 L.W. 4155. The proceeding below violated these principles. Thus the prosecution's case was conducted in a summary manner, with no opening statement, with no witnesses, and the prosecution was permitted to place in evidence the Peckham transcript over petitioner's objections. In the case below Judge Wilkin read the transcript of the Peckham trial, Judge Holtzoff's prejudicial certificate, the opinions of this Honorable Court and the court below, thereby obtaining knowledge from hearsay sources which obviously could not have been submitted to a jury in an ordinary criminal case. Judge Wilkin ruled, basing his ruling upon this hearsay material, that no evidence could be submitted to acquit petitioner because no defense was possible (R. 18, App. p, 9a) regardless what prejudicial conduct Judge Holtzoff and the prosecutor engaged in in the Peckham trial. Of course, petitioner has a right of defense. The evidence in his defense clearly established his innocence. In other words the entire case in chief in support of Charge I consists of the "cold" transcript of the Peckham trial. No witnesses were adduced to prove the charges against

petitioner or to describe in any way the conduct of the parties involved in these charges. Petitioner had no opportunity of confrontation, no right of cross-examination, and the undisputed testimony submitted in defense was brushed aside because no defense was permissible to Charge I in Judge Wilkin's view (R. 18, App. p. 9a). Such a hearing, if it can be called such, does not meet the requirements laid down by this Court in the *Cooke, Offutt* and *Nilva* cases, and the flat refusal of the court's below to follow these cases should be corrected in the interest of the proper administration of justice in criminal contempt cases in the Federal courts.

III

Under the Circumstances of the Case, Petitioner Was Denied Due Process of Law. the Trial Judge Based His Findings on Personal Knowledge Obtained From Hearsay Sources. Hence the Only Way That a Fair Trial Could be Obtained Before Judge Wilkin Was Through a Jury

As we have pointed out earlier, Judge Wilkin, upon personal knowledge which he obtained from reading the hearsay transcript of the *Peckham* case, the prejudicial certificate of Judge Holtzoff, the opinions of this Honorable Court and the Court of Appeals in the *Offutt* case, could not render a fair and impartial decision in this case. This is particularly apparent when you consider his philosophy that judicial impropriety can never be a defense when an attorney is charged with a contempt when he becomes involved with a biased, prejudiced and a hostile judge, whose conduct directed against the attorney deprives the attorney's client of a fair trial. If Judge Wilkin's views are correct, a judge could assault or even attempt to shoot an attorney and yet if the attorney defends himself and in doing so injures the judge, the attorney would

be guilty of contempt of court. That clearly is not the law and we submit that this Honorable Court's decisions in the *Cooke, Offutt* and *Nilva* cases, support our contentions in this regard. In contempt cases the rights and duties of judges and lawyers are reciprocal, *Sacher* v. *United States,* 343 U.S. 1; *Offutt* v. *United States,* 348 U.S. 11, 14; *State of Oregon* v. *Yates,* 302 P. 2d 719. In the *Yates* case, the Supreme Court of Oregon ruled (p. 723) that the "duties of attorney and judge in the trial of a jury case are reciprocal", citing many cases and the Canons of Judicial Ethics, Rules 5, 10, and 15. This means, when a judge provokes a lawyer and engages in activities prejudicial to a lawyer's client, it is not contempt for the lawyer to object thereto, to advise the judge that he considers his conduct improper and to base motions for a mistrial thereon. In such circumstances there is no wrongful intent by the lawyer and hence no contempt. *State of Oregon* v. *Yates,* supra; *In re Watts and Sachs,* 190 U.S. 1, 32-35. In such circumstances with Judge Wilkin holding the views that he did, the only possible way in which petitioner could have obtained even the semblance of a fair trial before him, would have been through a jury trial. Therefore, the denial of petitioner's demand for a jury trial was erroneous because that was the only method which would preserve not only fairness but that appearance of fairness which due process of law requires. *Offutt* v. *United States,* 348 U.S. 11, 18, *Berger* v. *United States,* 255 U.S. 22.

IV

The Charges as Laid Did Not Comply With Rule 42(b), the Proceedings Thereon Were Delayed Through the Dubious Methods of the Prosecution Resulting in the Delay of the Hearing Below of Four Years and Three Months, Thereby Prejudicing Petitioner and Depriving Him of the Speedy Trial Guaranteed Him by the Sixth Amendment to the Constitution

In the proceedings below the District Court and the prosecution have consistently selected dubious and illegal methods of prosecution. Rule 42(b) contemplates a hearing with the right of confrontation and the right of cross-examination. *Nilva* v. *United States*, 352 U.S. 385; 25 L.W. 4155. Yet the District Court and the prosecution have persisted in denying petitioner the type of hearing required in Rule 42(b) cases, and have persistently attempted to use summary methods in adjudging petitioner guilty of Charge I. As no order was ever entered by Judge Holtzoff requiring petitioner to show cause for the contempts allegedly committed in his presence, the proceedings below have been of dubious legality since their inception. Nevertheless, the prosecution has insisted upon treating the proceedings conducted by judges other than Judge Holtzoff, who did not see and hear the acts complained of, as 42(a) proceedings. These erroneous selections of dubious procedures caused two appeals, which were decided in petitioner's favor, prior to the commencement of the hearing before Judge Wilkin. Four years and three months passed in correcting these errors. All delays here are the responsibility of and chargeable to the District Court and the prosecution. Petitioner demanded from the very beginning a hearing and a trial in which he could submit evidence and be represented by counsel. This right has been wrongfully denied

him. The four years and three months delay is a denial to petitioner of that speedy trial guaranteed him by the Sixth Amendment. Petitioner was prejudiced because during this period of delay four important witnesses died. (R. 410-411) The guarantee of a speedy trial is a part of due process of law in the Federal Courts and is self-executing. *Petition of Provoo,* 17 F.R.D. 183, affirmed by this Honorable Court without opinion, *United States* v. *Provoo,* 350 U.S. 857. The long delays attributable to the District Court and the prosecution have the effect of turning this case from a prosecution into a persecution. Accordingly, we say petitioner's motion to dismiss the charges should have been granted and the right of an accused to a speedy trial preserved in the public interest.

CONCLUSION AND PRAYER

While this case concerns but one member of our bar, it involves, as mentioned by Justice Frankfurter in the *Offutt* case, "the right of an accused to fearless, vigorous and effective advocacy" which must be preserved in criminal trials. When that right is endangered as it was in the *Peckham* case by an angry judge, appellate courts should protect the right of advocacy. If, in the circumstances of this case, petitioner failed to act as he did for fear of disfavor or punishment, not only would he be recreant to the noble and fearless traditions of our bar (*In Re Cottingham,* 66 Colo. 335, 182 P. 2) but the first Peckham conviction never would have been reversed. Lawyers must be fearless and courageous advocates. The religious, philosophical, martyrlike, and Christlike actions of the religious men, philosophers, scholars, and The Christ mentioned in the opinion of Judge Wilkin cannot be applied as con-

trolling principles in contempt proceedings involving a trial lawyer engaged in criminal defense work. To apply such principles would be to destroy advocacy because if a lawyer stands "silent" as Judge Wilkin advocates, and does not protect the rights of his client by making objections and motions concerning improprieties coming from a judge or prosecutor, effective advocacy is dead. And this Court should know the District Court is seeking to disbar petitioner, based in part on Charge I. Certainly the erroneous judgment below should not be permitted to be thus used to further harass and unjustly punish petitioner, particularly when no attempt has been made to punish the judge and the prosecutor for their misconduct.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a writ of certiorari and bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

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APPENDIX

Filed Oct. 11, 1956

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 3-55

UNITED STATES OF AMERICA

v.

DORSEY K. OFFUTT

Memorandum by the Court

WILKIN, District Judge (By Designation):

This cause has had an extended history in the courts. It originated in the trial of the case of *United States* v. *Peckham*, Criminal No. 579-52 in this Court. At the conclusion of that trial, the presiding judge cited the defendant here, Offutt, who had served as trial counsel for Peckham, for contempt of court, and filed twelve separate charges based on Offutt's conduct during the trial. The Court found the respondent guilty of all the charges, and ordered him committed for ten days to the custody of the United States Marshal.

The Court of Appeals affirmed the trial judge as to four of the twelve findings of contempt and reduced the punishment to commitment for a period of 48 hours. *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F. 2d 842 (1953). On appeal, the Supreme Court, under the authority of *Cooke* v. *United States*, 267 U.S. 517 (1925), and in the exercise of the Court's supervisory authority over the administration of criminal justice in the federal courts; held that the charges should be tried before a judge other than the one before whom the contempt was alleged to have originally arisen. *Offutt* v. *United States*, 348 U.S. 11 (1954).

In compliance with that decision, the United States Attorney filed in this court an application for an order to the defendant herein to show cause why he should not be adjudged in criminal contempt. In *Re Dorsey K. Offutt*, Miscellaneous No. 3-55. Subsequently, a hearing was held before another judge, in accordance with the mandate of the United States Supreme Court, on the charges contained in the order to show cause (which were identical with the charges which had previously been affirmed by the Court of Appeals). Respondent was then found guilty on two of the four charges.

The case was again appealed. It should be noted that while on appeal, the United States was made a party plaintiff by order of the Court of Appeals, and the respondent was denominated "defendant." That court then reversed and remanded the cause to the District Court as a result of the failure of the trial judge to receive evidence outside of the record, in mitigation or exculpation of the acts of the defendant. *Offutt* v. *United States*, U.S. App. D.C. , 232 F. 2d 69 (1956).

Defendant appealed the action of the Court of Appeals, however, and the United States Supreme Court denied certiorari on June 11, 1956. *Offutt* v. *United States*, 24 U.S.L. Week 3337. A petition for rehearing of that action has been overruled.

Summary of Evidence

This case came on for trial on two of the four charges presented in the hearing on the rule to show cause. They were I and III.

> "I. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court. * * *
>
> "III. On several occasions, he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. * * *"

Counsel for the plaintiff, in support of the two charges, offered in evidence and read excerpts from the transcript of the Peckham trial. Plaintiff then rested.

Counsel for defendant, after an opening statement, called eleven witnesses and proffered other witnesses for cross examination whose testimony would have been cumulative. The defendant then rested.

Counsel for the plaintiff then called two rebuttal witnesses who had served as jurors in the Peckham trial, and proffered two more witnesses for cross examination whose testimony was said to be cumulative.

The witnesses called by the defendant were lawyers who had been present in court during part or all of the Peckham trial. They testified as to conduct of the judge and the attorney for the defendant during that trial. They detailed statements and conduct of the trial judge which they thought had provoked the challenged acts and statements of the defendant in this case. They testified that in their opinion the defendant had been respectful and proper. On cross examination some of them admitted that the defendant's conduct at times had "not been exemplary," and that he had been "persistent," but they thought the conduct of the trial judge caused the acts of counsel. One witness referred to the altercations between judge and counsel as a "conflict of personalities." They also said that Offutt had consulted them about the case and they had advised him that it would be necessary for him to state for the record the grounds for his objections to conduct of the judge, and Offutt himself testified that that was why he made statements in open court regarding the judge.

The two witnesses called in rebuttal said that Offutt had disobeyed orders and directions of the judge, and that in their opinion such conduct was the occasion of the apparent friction between judge and counsel. They

admitted that at times the judge had shown anger by facial expression, tone of voice and gesticulations, but they thought such anger had been provoked by trial counsel.

Effect of Evidence

Except for the testimony of the defendant Offutt, the oral evidence does not vary the record of the Peckham trial or the impressions created by a reading of the transcript. The testimony of defendant Offutt disclaims evil or contumacious intent. It tells why Offutt did the things now charged or cited as contumacious, and what the basis or reason was for certain questions alleged to have "no foundation."

A consideration of all the oral testimony confirms the effect created by a mere reading of the transcript and record of the Peckham case. After giving due regard to the testimony of Offutt regarding his intention, purpose, and the factual basis of his conduct, the question remains, Does his conduct as revealed by the record constitute contempt of court?

Analysis of Former Decisions

In answering that question, this Court is at once confronted by the decisions and opinions of the Court of Appeals and of the Supreme Court, cited by counsel on both sides of this case. The Court of Appeals reversed the conviction in the Peckham case because of conduct of the trial judge which it concluded "demonstrated a bias and lack of impartiality." In determining the first appeal of Offutt from the finding of contempt, the Court of Appeals said that the petitioner's conduct could not "be considered apart from that of the trial judge," and reduced the sentence because of the conduct of the trial judge which they had mentioned when reversing the conviction in the Peckham case.

The majority opinion of the Supreme Court states that the whole record amply supports this characterization of the conduct of the trial judge by the Court of Appeals. Because of the attitude of the trial judge in the Peckham case, they remanded the contempt proceedings for retrial in the District Court by a judge other than the judge who presided at the Peckham trial.

On the other hand, counsel for the prosecution called this Court's attention to the fact that the Court of Appeals in its first opinion had affirmed the finding on four of the charges of contempt. The Court of Appeals in that case considered the improper conduct of the judge as grounds for mitigation, but the court did not absolve the petitioner Offutt from all wrong doing.

The Supreme Court in the majority opinion said, "Nor are we unmindful of the fact that the ultimate finding of reprehensible conduct by the petitioner was sustained by the Court of Appeals" * * * and further: "We are not intimating that the Court of Appeals was not justified in finding ample support for its conclusion that the trial judge was warranted in deeming petitioner's conduct as such contemptuous."

The Supreme Court reversed the conviction because it concluded that the accused should have had a trial before a different judge. Three of the Justices dissented, saying that they would affirm the judgment of the Court of Appeals, and one of the dissenting judges said, "This case goes back to the District Court for hearing by another judge on charges as to which, on the record, this court admits petitioner is guilty. It is only a question of how much punishment he shall receive."

Analysis of Evidence and Law

This Court ordinarily has no authority and no occasion to pronounce judgment on the work or conduct of another

judge of this court. The last mandate from the Court of Appeals, however, ordered a retrial and consideration of such evidence as might be offered in addition to the record of the Peckham trial, for the purpose of showing the conduct and circumstances of such trial and what effect, if any, the conduct of the trial judge had on the challenged conduct of trial counsel. Having considered all the evidence in accordance with the mandate, this Court is confronted by three questions:

(1) Did the conduct of the trial judge in the Peckham case justify, excuse or exculpate counsel for conduct alleged to be contumacious (and so found to be by the reviewing courts)?

(2) Did the conduct of the trial judge extenuate, mitigate or ameliorate the conduct of trial counsel, if found to be improper?

(3) If the conduct of trial counsel was not justified or excused by the conduct of the trial judge, what should the sentence of punishment be in view of extenuating circumstances?

(1)

It is the finding and judgment of this Court that the conduct of the trial judge did not justify or excuse the challenged conduct of trial counsel. It is the opinion of this Court that improper conduct of a trial judge can never justify or excuse contemptuous conduct of a trial attorney. It is, of course, the duty of a lawyer to protect the rights of his client, but vigorous advocacy should never extend to contempt of court. He is obliged at times to state for the record the reasons for his motions or objections, but that should be done decorously in accordance with the rules of trial practice. If denied by the trial judge an opportunity to state his reasons or objections, he should rest content that an appellate court

will consider his proffer and allow him to state his reasons and objections on appeal.

One of the witnesses called by the defendant testified that he had told Offutt that he should be respectful whatever the conduct of the judge. The reason for this strict rule is that the trial judge represents the sovereignty of the law and government. If the man who is counsel meets the man who is judge on the street, in the market place, or on the playing field, they are governed by the same rules of conduct that apply to other men, and they stand on equal footing. When in court, however, the judge, even in spite of human frailties, still is the representative of the sovereign power, and counsel must always respect the office whatever his opinion of the incumbent. Two wrongs do not make a right, and misconduct can not obliterate other misconduct. It is the duty of all participants in a trial to maintain the dignity and good order of the courtroom. The practical requirements of orderly procedure also support this rule.

Rules of Parlimentary Practice and Roberts' Rules of Order, which govern assemblies and meetings forbid further argument after an issue is settled, and one who speaks on a determined issue is out of order. So the rules of trial practice, which govern a more formal procedure, forbid any argument after the court has ruled on a motion, an objection or other issue. Counsel should not again address the court regarding such a settled matter without leave first obtained. Even if all the criticisms and accusations against the judge's conduct should, for purposes of argument, be admitted, still in this case, as in all such cases, there came a time when counsel should have been silent. He should have trusted that his silence would plead his cause on appeal. Further contention or argument became not only futile, but improper.

This rule is supported not only by decisions and practice, but is based on a fundamental p ciple of life which has been exemplified by the great trials of history. Such trials demonstrate the wisdom of silence when furth contention is futile. With magnificent equanimity and submission, Socrates accepted the death sentence of the popular court of Athens, and when his friends arranged the means for his escape from prison, he declined to take advantage of such arrangements, saying that it was the duty of a citizen to obey the law even when its sentence is unjust.

Jesus of Nazareth stood mute before Pilate, in spite of insults and scourgings. When He saw that Pilate feared the Emperor and was determined to please the people who cried for crucifixion, Jesus kept silent, and His silence redounds to His glory.

Sir Thomas More's farewell to his judges is another magnificent example of the transcendency of meekness over injustice. Chief Justice Coke himself set an example for lawyers when he was called to account before the king. When the king persisted in the assertion of his arbitrary will, Coke appropriately replied, "It would not become me further to argue with your Majesty."

A modern exemplification of this principle is found in a book just recently published, entitled "In Silence I Speak: The Story of Cardinal Mindszenty," written by George N. Shuster, President of Hunter College. The author says: "Today the Cardinal's silent martyrdom is more eloquent than all the political cliches that try to compromise with totalitarian ideology." The author concludes: "Americans must believe in something nobler than themselves if they desire the rest of the world to believe in it, too."

So members of the legal profession must believe in the ideals of their profession more than in themselves

if the sovereignty of law is to be respected. This fundamental principle of life was stated by Gerard Groote, one of the most learned men of the 14th Century, in these words: "By patience and humility we become stronger than all our enemies."

Judicial impropriety can not be considered a complete defense, but only an extenuating circumstance.

(2)

When a vigorously contested trial, lasting more than fourteen days, develops personal animosity and acrimonious language, it is almost as impossible to determine the definitive cause and comparative responsibility for each impropriety as it is to unscramble eggs. The trial of this case, however, did develop facts and circumstances which this Court has to consider. It raised questions on which this Court should announce its ruling. Charge No. III will be considered first.

Charge No. III

The essence of the charge is that the defendant asked highly prejudicial questions for which there was no foundation. During this trial it was conceded by counsel that the word "foundation" should be considered in two parts: Foundation in fact, and foundation in law.

The evidence revealed that the defendant had some information of facts which would supply a foundation for the questions asked. For instance, he had been informed that the prosecuting witness in the Peckham trial had been taken by police officers to Police Headquarters for questioning. He thought that information indicated an arrest, and the broad definition of arrest supports his interpretation. A more diligent investigation would have revealed that there had been no arrest of the witness in the sense which his question implied. He was not

legally justified in asking the witness WHEN she was first arrested. If warranted at all, the question should have been, Were you arrested? The rules of evidence and the law of the District of Columbia prohibit such a question for the purpose of impeaching the credibility of the witness. A witness's credibility can be impeached only by evidence of conviction of crime. 3 WIGMORE, Sec. 980a; D. C. Code § 14—305; *Sandford* v. *United States*, 69 U.S. App D.C. 44, 98 F. 2d 325. The defendant contended that he was not asking the question for the purpose of impeachment, but to support his contention that the abortion charged against Doctor Peckham had in fact been committed by the prosecuting witness herself, and that she had been promised immunity from prosecution. This Court doubts the legal propriety of such question in the circumstances, but there is authority for questions of that character. WIGMORE, Sec. 967; *People* v. *Simard*, 314 Mich. 624, 23 N.W. 2d 106 (1946). The Court is of opinion, however, that the asking of such a question in the circumstances did not itself constitute contempt.

As to the questions regarding prior abortions, the evidence revealed that factual information had been obtained by defense counsel from doctors and hospital records to support the question. This Court is of opinion, however, that such questions were not proper in law. Doctor Peckham was being tried for an abortion committed in 1952. Questions regarding abortions committed in 1947 or 1950 were irrelevant. But here again this Court cannot find that such irrelevant questions in and of themselves constituted contempt. This Court doubts whether any charge of contempt would have been made if such questions were the only basis for it. They were no doubt cited along with other charges to show the defendant's general attitude. It is the finding and judgment of the Court that the questions asked had foundation in fact, but some of them lacked foundation in law.

Charge No. I

Charge No. I alleges that on numerous occasions the defendant made insolent, insulting and offensive remarks to the Court, and was guilty of gross discourtesy to the Court. In support of this charge, counsel for plaintiff cited forty-six excerpts from the transcript of the Peckham case, and offered the evidence of certain jurors. The defendant contended that what he said was true, and that he said it in order to make a record as required by *Billeci* v. *United States*, 87 U.S. App. D.C. 274 (12), 184 F. 2d 394, and in order to comply with the advice given him by counsel whom he had consulted. Advice of counsel is not a defense to a charge of contempt. Counsel for defendant stated that such evidence tended to show zeal for client rather than insolent or offensive attitude toward the court.

Defendant contended further that he was justified in making the statements in the manner they were made by a well-established practice in this court of making such statements during a bench conference, and by the fact that the judge had refused his request for a bench conference and had ordered him to make his statements and objections in open court (Transcript of June 5, page 51 (616)).

It is this Court's opinion that such statements of objections and reasons should always be made to the reporter in a voice audible to the judge, but not to the jury. When making objections to the judge's facial expressions, gestures, and statements, counsel should have approached the reporter and made them in a low voice. If the Court would not permit such presentation, counsel should have rested content that the record would show his proffer. *Butler* v. *United States*, 88 U.S. App. D.C. 140 (9), 188 F. 2d 24. To make such statements in open court and then bandy words with the court as to the truth and propriety of his statements was grossly improper.

Consideration of the excerpts of the transcript and the testimony and arguments brings this Court to the conclusion that the inciting cause of the asperity and improprieties in the Peekham trial was what may be appropriately and simply termed "back talk." Webster's Dictionary defines "back talk" as "impudent or argumentative reply, especially from a junior or a subordinate." The transcript is weighted with retorts which come within that definition (See Findings of Fact). Counsel also asked impertinent and improper questions of the court, and disputed the word of the judge, and frequently repeated derogatory assertions. Such conduct, together with counsel's failure to comply with orders of the court, such as directions to return to counsel table and be silent, reveal an attitude toward the presiding judge which cannot be tolerated or condoned, if orderly trial practice and the dignity of judicial administration is to be preserved. Such conduct of counsel is contempt per se. Neither ignorance, nor advice of counsel, nor zeal for client, can alter the contumacious character of such conduct.

Contempt usually occurs when self-assertion predominates over respect for authority. There is no place for selfishness or pride in the service of the law. A great lawyer said two thousand years ago, "The law is a voiceless magistrate, and a magistrate is the voice of the law." Since the law is impersonal, there should be no personal feeling in the practice and administration of the law. A man is never more upright in mind and heart than when he genuflects before the Supreme Authority. A lawyer is never more honorable and respectable than when he is humble before the law. Humility forestalls humiliation.

It is the finding and the judgment of this Court that the defendant is beyond all doubt guilty of contempt of court. That brings us to the third question.

(3)

As to the sentence to be imposed, the Court is mindful that the Court of Appeals, after reviewing the record of the Peckham case and the record of the first contempt trial, reduced the sentence of ten days custody, imposed by the trial court, to a sentence of forty-eight hours in the custody of the Marshal. A consideration of all the evidence offered in this last trial induces the conclusion that a sentence committing the defendant to the custody of the Marshal for forty-eight hours is just and proper in this case. The sentence of this Court will, therefore, be that the defendant be committed to the custody of the United States Marshal for forty-eight hours, and that execution of the sentence begin at 10 o'clock A.M. on October 13, 1956.

Findings of fact and conclusions of law have been filed as a supplement to this opinion.

R. N. WILKIN
U. S. District Judge

Washington, D. C.,
October 11, 1956.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13572

DORSEY K. OFFUTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided June 17, 1957

Mr. Warren E. Magee, with whom *Miss Charlotte Maskey* was on the brief, for appellant.

Mr. Harold H. Greene, Assistant United States Attorney, for appellee. *Messrs. Oliver Gasch*, United States Attorney, *Edward P. Troxell*, Principal Assistant United States Attorney, *Lewis Carroll*, Assistant United States Attorney, and *Donald E. Bilger*, Assistant United States Attorney at the time brief was filed, were on the brief for appellee.

Before EDGERTON, *Chief Judge*, and BAZELON and FAHY, *Circuit Judges*.

PER CURIAM: The case is here for the third time. We cite in the margin references to its prior history in the Supreme Court and in this Court.[1] On the last trial, the subject of the present appeal, appellant was convicted of contempt of court upon the charge that, during the trial of *United States* v. *Peckham*, reported on appeal at 93 U.S.

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[1] *Offutt* v. *United States*, 93 U.S. App. D.C. 148, 208 F.2d 842, *reversed*, *Offutt* v. *United States*, 348 U.S. 11; 98 U.S. App. D.C. 69, 232 F.2d 69, *cert. denied* 351 U.S. 988.

App. D.C. 136, 210 F.2d 693, "on numerous occasions he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court." We hold that the evidence supports the conviction upon this charge and that the validity of the conviction is not impaired by error. Appellant was also convicted upon the charge that on several occasions he asked questions of witnesses during said *Peckham* trial that were highly prejudicial to the witness and as to which there was no foundation. We hold that the evidence does not support, with the required freedom from doubt, a conviction of criminal contempt upon this charge.

The District Court sentenced appellant to be committed to the custody of the United States Marshal for 48 hours. Considering the history of the case as a whole and our present reversal of the conviction upon one of the charges, as above stated, we think the sentence should be reduced to commitment to the custody of the United States Marshal for 6 hours.[2]

The case will be remanded to the District Court with directions to modify the judgment so that the adjudication of guilt is limited to the charge contained in paragraph numbered I in the order to show cause and so that the sentence is reduced to commitment to the custody of the United States Marshal for six hours instead of for forty-eight hours.

Judgment, as so modified, affirmed.

[2] See *United States* v. *United Mine Workers of America*, 330 U.S. 258, 304-305; *Rosenfeld* v. *United States*, 167 F.2d 222, 223.

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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1957

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Cases:

- *Nilva* v. *United States*, 352 U. S. 385 — 6, 7
- *Offutt* v. *United States*, 348 U. S. 11 — 3, 4
- *Offutt* v. *United States*, 232 F. 2d 69, certiorari denied, 351 U. S. 988 — 4

Statute and Rule:

- 18 U. S. C. 401 — 2
- Rule 42, F. R. Crim. P. — 2

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 565–566; Pet. App. 14a–15a) is not yet reported. The memorandum opinion of the District Court (R. 11–22; Pet. App. 1a–13a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1957 (R. 567). The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Warren to August 16, 1957, and the petition for a writ of certiorari was filed on that day. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a proceeding against an attorney for contempt by reason of his conduct as defense attorney in a criminal case, held before a judge other than the one who tried the case, it was proper to introduce the transcript of the original trial to show what the attorney had there said and done.

2. Whether the fact that four years elapsed during the course of petitioner's two appeals which ultimately resulted in a reversal of his convictions for contempt with direction for new trials required dismissal of the charges for lack of a speedy trial.

STATUTE AND RULE

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, F. R. Crim. P. provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and

shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner is seeking a review by this Court of his third hearing on contempt charges arising out of his conduct, in the presence of the court, as defense attorney in the criminal trial of one Peckham in June 52. In *Offutt* v. *United States*, 348 U. S. 11, decided November 8, 1954, this Court reversed petitioner's first conviction which had been affirmed on four specifications by the Court of Appeals for the

District of Columbia Circuit (208 F. 2d 842). In reversing, this Court held that the district judge who had presided at the trial had sufficiently "permitted himself to become personally embroiled with the petitioner" to require that another judge preside at the rehearing of the charges (348 U. S. at 17–18). The case was remanded to the District Court on December 28, 1954.

Petitioner's second conviction, after a hearing held before Judge McLaughlin[1] in May 1955, was also reversed. The conviction on two of the original specifications was set aside. The cause was remanded for a new trial on the remaining two specifications on the ground that the judge had erroneously refused to permit petitioner to submit oral testimony in his defense. *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C.), certiorari denied, 351 U. S. 988.

On remand, the case was tried before Judge Wilkins on the charges of (1) insolent and offensive remarks and gross discourtesy to the court on numerous occasions, and (2) asking of prejudicial questions for which there was no foundation.

Petitioner's motions for a jury trial and dismissal on the ground of denial of a speedy trial were overruled (R. 5–7, 10).

At this third hearing the government, over petitioner's objection, read into the evidence excerpts

[1] On application of the United States Attorney, Judge McLaughlin issued an order requiring petitioner to show cause why he should not be punished for contempt for his misbehavior in the presence of the court at the Peckham trial. This application referred to specific instances as they appeared in the Peckham record (R. 1–4).

from the record of the Peckham trial (R. 67–68). The entire transcript was also admitted in evidence (R. 68).

In defense, attorneys who had been present during all or part of the trial, and whom petitioner consulted during the trial, testified that petitioner's objections to the judge's tone of voice and manner and to the judge's interruption of his examination of witnesses were necessary to protect the client, that petitioner was usually provoked by the judge, and that generally petitioner remained polite and courteous. They said that there was nothing in petitioner's conduct to warrant the judge's raising his voice, and that petitioner in fact was obsequious and afraid that he was going to do something wrong (R. 161, 164–166, 179, 180, 181–186, 201, 205–209, 220, 227, 237, 238–239, 375).

Petitioner testified that he made all of his objections in good faith to the judge, that they were made solely to protect his client, and that the court unduly interfered in the cross-examination of witnesses. He said that he was courteous and polite to the judge and addressed him in a normal tone of voice (R. 377–378, 381, 382, 383, 394, 416–418, 428–433, 435, 437–440, 441–442).

In rebuttal, the government introduced two jurors in the Peckham trial who testified that petitioner consistently refused to obey the judge, constantly objected, and that petitioner provoked and was insulting and discourteous to the court (R. 503–507, 515–516).

The District Court found petitioner guilty on the two specifications of contempt and issued findings of fact and conclusions of law (R. 11–27). Petitioner

was sentenced to a term of imprisonment of 48 hours. On appeal, the Court of Appeals affirmed the conviction on the first specification charging insolent conduct.[2] It remanded with directions that the sentence should be reduced to imprisonment for 6 hours.

ARGUMENT

1. The major portion of the petition for a writ of certiorari is devoted to the argument, variously phrased, that it was error for the presiding judge to receive in evidence and consider the parts of the transcript of the Peckham trial which contained a record of what petitioner said as defense attorney at that trial. Petitioner's conduct at the Peckham trial was, of course, the subject of the contempt proceeding. The transcript was the most direct evidence of what he actually did say there. It was as directly relevant to the issues in this case as is the transcript of a defendant's testimony before a grand jury at a trial for perjury before the grand jury.

Petitioner has wholly misread the recent decision of this Court in *Nilva* v. *United States*, 352 U. S. 385. That case involved a proceeding to punish for contempt an officer of a corporation (who, although of record as attorney for a defendant, had no part in the criminal case) for non-production of books and records pursuant to subpoena, and for false and evasive testimony when explaining his non-production to the trial judge. The transcript which the govern-

[2] The findings of the District Court set forth 43 instances of insolent conduct of petitioner (R. 22–27). The portions of the transcript of the Peckham trial to which the judge refers in these findings appear at pages 69–125 of the record.

ment conceded could not be relied upon was of the testimony of an F. B. I. agent, at the original trial, as to the finding of the books and records under an impounding order of the court, and as to the contents of the records found. It was not, as in this case, a transcript of what the defendant in the contempt proceeding had said and done in a previous proceeding. Indeed, no question was raised in *Nilva* as to the fact that the transcript of what the defendant had said to the judge could be considered.

The Court of Appeals had previously held, and petitioner was in this proceeding granted, the right to call witnesses to explain why he said the words recorded in the transcript. This in no way makes irrelevant the direct record of what he said.[3]

2. The argument that petitioner was deprived of a speedy trial was previously urged by petitioner as grounds for dismissal, rather than remand, when his second conviction was reversed. As pointed out in the government's brief in opposition at that time (No. 928, O. T. 1955), while a certain amount of delay pending review was inevitable, petitioner was himself responsible for some of the delays. For example, after the initial affirmance by the Court of Appeals on November 19, 1953, petitioner sought rehearing in

[3] Petitioner's claim that he should have been granted a jury trial rests for the most part on his argument that the transcript should not have been considered by the trial judge. To the extent that he argues that the judge applied too high a standard of what constitutes proper respectful action (Pet. 23–24), he is merely challenging the sufficiency of the evidence to support his conviction. This contention is fully answered by the findings of the trial court.

that court and then applied for an extension of time to file a petition for a writ of certiorari with the result that his petition was not filed until February 12, 1954. Petitioner did not acquire immunity from prosecution by securing a new trial on appeal.

Petitioner adds here (Pet. 26) that he was prejudiced by the delay because of the death of four defense witnesses, attorneys whom petitioner consulted (R. 411). The absence of their testimony can hardly be said to be prejudicial since petitioner had already submitted the testimony of ten other lawyers on the point that his conduct was necessary to protect his client.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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